Lo Tet Shin v The Government of the State of Sabah & Anor

HIGH COURT (KOTA KINABALU) — NO BKI-25–54/9 OF 2011
DAVID WONG J
9 MARCH 2012

Land Law — Acquisition of land — Compulsory acquisition — Sabah government published gazette notice of revocation of compulsory acquisition of applicant's land — Planned project on acquired land cancelled — Whether decision to revoke acquisition and publication of it nullities — Whether earlier publication in gazette of declaration of acquisition vested land in government — Whether government devoid of express or implied power to revoke completed acquisition — Whether acquired land could be re-alienated to applicant by revoking acquisition

The Sabah State Government ('the first respondent') acquired, among other parcels of land, a large area of the applicant's land for the development of an SME Park and a Halal Hub. As mandated by the Land Acquisition Ordinance ('the Ordinance'), a declaration of the acquisition was published in two issues of the *gazette*. A few months after the applicant had executed the surrender documents and given up vacant possession of the land, the respondents and the statutory body tasked with undertaking the development decided that the land acquisition costs rendered the development financially not viable and the Halal Hub project was cancelled. This led to the first respondent publishing a notice in the *gazette* revoking the acquisition of, amongst others, the applicant's land. The applicant applied to the High Court by way of judicial review to set aside the first respondent's decision to revoke the acquisition of his land. He demanded the respondents pay him the agreed compensation sum of RM9,990,000 for the acquisition. The applicant said pursuant to s 3(3) of the Ordinance upon the second publication of the declaration of acquisition in the *gazette*, the acquired land vested in the government free from all encumbrances and it was deemed that the land had been surrendered by the applicant. The applicant argued that the first respondent had no express power under the law to revoke a completed acquisition and both its decision to do so and the publication of a *gazette* notification of the revocation were nullities. The State Attorney General ('AG'), submitting on behalf of the respondents, argued that under certain extraordinary circumstances, the first respondent could legally revoke and withdraw the acquisition eg when, as in the instant case, the acquisition was only completed on paper and physical possession of the land had not yet been acquired; where the land owner had not suffered any prejudice; and, when it was against public interest to compel the government to proceed with the acquisition which served no useful purpose but instead

resulted in wastage of public funds. The AG submitted that the court, on the ground of public interest, had the discretion to refuse the applicant's application; that the first respondent had an implicit power to revoke the compulsory acquisition and that the applicant could sell his land to a third party for the same price as the agreed compensation figure.

Held, allowing the application with costs:

(1) The respondent had no implied power to revoke the acquisition. The notice of revocation had no legal basis (see paras 38(a) & (f)).

(2) By operation of law, the applicant's land vested in the first respondent upon the second publication of the acquisition declaration in the *gazette* whether or not it had taken physical possession of the land. The applicant had no legal or equitable right to deal with the land. There was also no specific provision in the statute book that allowed the respondent to revoke the acquisition (see para 36).

(3) State land could only be alienated to an individual or corporation by applications by them to, and approval by, the Director of Lands and Surveys. There was no other provision in law for alienation of state land, be it by way of revocation of compulsory acquisition or otherwise. Any other manner in which an individual or corporation became registered owners of state land would contravene ss 9, 10 and 12 of the Land Ordinance and be ultra vires (see paras 36 & 38(c)).

(4) Though on the face of it the applicant might not have suffered any prejudice, he might or would suffer prejudice in the future in that he might or would have a problem selling or charging his land as any potential purchaser or financier would need assurance that the applicant was in fact the legal and beneficial owner of the land (see para 38(d)).

[Bahasa Malaysia summary

Kerajaan Negeri Sabah ('responden pertama') telah memperolehi, antara petak-petak tanah yang lain, satu kawasan besar tanah pemohon bagi pembangunan Taman SME dan Hab Halal. Sebagaimana yang dimandatkan oleh Ordinan Pengambilan Tanah ('Ordinan'), suatu akuan pengambil alihan telah disiarkan dalam dua isu *warta*. Beberapa bulan selepas pemohon telah melaksanakan dokumen penyerahan balik dan memberikan milikan kosong tanah tersebut, responden dan badan berkanun yang ditugaskan untuk melaksanakan pembangunan memutuskan bahawa kos pengambilan tanah menjadikan pembangunan tersebut tidak berdaya maju dari sudut kewangan dan projek Hab Halal telah dibatalkan. Ini menyebabkan responden pertama menyiarkan suatu notis dalam *warta* membatalkan pengambilalihan, antara lain, tanah pemohon. Pemohon memohon kepada Mahkamah Tinggi melalui semakan kehakiman untuk mengetepikan keputusan responden pertama yang membatalkan pengambilalihan tanah tersebut. Dia menuntut responden

membayar kepadanya jumlah pampasan yang dipersetujui sebanyak RM9,990,000 bagi pengambilalihan. Pemohon menghujahkan bahawa menurut s 3(3) Ordinan, apabila perisytiharan pengambilalihan disiarkan buat kali kedua dalam *warta*, tanah yang diambilalih menjadi hak kerajaan, bebas daripada segala sekatan dan tanah tersebut disifatkan telah diserahkan oleh pemohon. Pemohon menghujahkan bahawa responden pertama tidak mempunyai kuasa nyata di bawah undang-undang untuk membatalkan pengambilalihan yang lengkap dan kedua-dua keputusan untuk berbuat sedemikian dan penyiaran pemberitahuan pembatalan dalam *warta* merupakan suatu keterbatalan. Peguam Negara mengemukakan bagi pihak responden, menghujahkan bahawa di bawah keadaan-keadaan luar biasa yang tertentu, responden pertama, di sisi undang-undang, boleh membatalkan dan menarik balik contohnya pengambilalihan apabila, seperti dalam kes ini, pengambilalihan tersebut hanyalah lengkap dalam kertas dan pemilikan fizikal tanah tersebut telah tidak lagi diperolehi; di mana pemilik tanah tersebut tidak mengalami sebarang prejudis; dan apabila ia adalah bertentangan dengan kepentingan awam untuk memaksa kerajaan meneruskan pengambilalihan yang mana tidak mendatangkan faedah tetapi sebaliknya mengakibatkan pembaziran dana awam. Peguam negara telah menghujahkan bahawa mahkamah, atas dasar kepentingan awam, mempunyai budi bicara untuk menolak permohonan pemohon; bahawa responden pertama mempunyai kuasa tersirat untuk membatalkan pengambilalihan wajib tersebut dan bahawa pemohon boleh menjual tanahnya kepada pihak ketiga untuk harga sama dengan jumlah pampasan yang dipersetujui.

Diputuskan, membenarkan permohonan dengan kos:

(1) Responden tidak mempunyai kuasa tersirat untuk membatalkan pengambilalihan. Notis pembatalan tidak mempunyai asas undang-undang (lihat perenggan 38(a) & (f)).

(2) Melalui operasi undang-undang, tanah pemohon yang terletak hak pada responden pertama apabila perisytiharan kedua disiarkan dalam *warta*, sama ada ya atau tidak ia telah mengambil pemilikan fizikal tanah pengambilalihan. Pemohon tidak mempunyai hak di sisi undang-undang atau ekuiti untuk berurusan dengan tanah tersebut. Tiada juga peruntukan khusus dalam buku statut yang membenarkan responden untuk membatalkan pengambil alihan (lihat perenggan 36).

(3) Tanah kerajaan hanya boleh ditukar milik kepada individu atau perbadanan melalui permohonan oleh mereka, dan kelulusan oleh Pengarah Tanah dan Ukur. Tidak ada peruntukan lain dalam undang-undang bagi pemberimilikan tanah kerajaan, sama ada dengan cara pembatalan pengambilalihan wajib atau sebaliknya. Apa-apa cara lain di mana seorang individu atau perbadanan menjadi pemilik tanah

kerajaan berdaftar akan melanggar ss 9, 10 dan 12 Ordinan Tanah dan ultra vires (lihat perenggan 36 & 38(c)).

(4) Walaupun pada dasarnya pemohon tidak mungkin telah mengalami apa-apa prejudis, dia mungkin akan mengalami prejudis pada masa akan datang yang mana dia mungkin akan mempunyai masalah menjual atau mengecaj tanah tersebut kerana mana-mana pembeli berpotensi atau pembiaya memerlukan jaminan bahawa pemohon adalah sebenarnya pemilik undang-undang dan bermanfaat tanah tersebut (lihat perenggan 38(d)).]

Notes

For cases on compulsory acquisition, see 8(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2170–2173.

Cases referred to

Boddington v British Transport Police [1999] 2 AC 143, HL (refd)
Cekal Berjasa Sdn Bhd v Tenaga Nasional Sdn Bhd [2002] MLJU 626; [2002] 1 LNS 315, HC (not folld)
DPP v Head [1959] AC 83, HL (refd)
Egerton v Earl Brownlow [1843–60] All ER Rep 970; 4 HL Cas 106, HL (refd)
Khoo Ah Imm @ Chang Bee Kiam & Ors v Datuk Bandar Kuala Lumpur & Anor [1997] 2 MLJ 602; [1997] 3 CLJ 519, CA (refd)
Lawlor and others v Union of Post Office Workers [1965] 1 All ER 353, Ch D (refd)
Lim Phin Khian v Kho Su Ming [1996] 1 MLJ 1, FC (refd)
Ngu Toh Tung & Ors v Superintendent of Lands & Survey, Kuching Division, Kuhing & Anor [2006] 1 MLJ 142; [2006] 1 CLJ 30, CA (refd)
R v Paddington Valuation Officer ex p Peachey Property Corporation Ltd [1966] 1 QB 380, CA (refd)
Richardson v Mellish (1824) 2 Bing 229 (refd)
Sham Lol (Dr) v Patiala and East Punjab States Union ADR 1955 NUC 1873 (refd)
William Lawrie v George Lees (1881) 7 App Cas 19, HL (refd)

Legislation referred to

Electricity Supply Act 1990 s 11
Land Acquisition Act 1984 [IND]
Land Acquisition Ordinance ss 3, 3(1), (2), (3), 6, 10
Land Ordinance ss 9, 10, 12
Interpretation and General Clauses Enactment 1963 s 28(1)
Mental Deficiency Act 1913 [UK] s 56(1)(a)

Mary Lee (Lee & Kong) for the applicant.
Roderick Fernandez (Sabah State Attorney General's Chambers) for the respondent.

David Wong J:

PROCEEDINGS

[1] The applicant's claim, through this judicial review, is to set aside the decision of the first respondent in revoking the compulsory acquisition of 12.4 acres of land held under CL 015045306 situated at Telipok, Kota Kinabalu ('Telipok land') under *Gazette* Notification No 283 of 2010 by a purported notification of revocation of acquisition dated 15 August 2011 gazetted under *Gazette* Notification No 625 of 2011 published in the *gazette* on 18 August 2011 and 25 August 2011.

BACKGROUND FACTS

[2] The applicant is the owner of the Telipok land. The first respondent acquired the Telipok land with a public purpose of developing the Sepangar SME Park and Halal Hub at Sepangar, Kota Kinabalu pursuant to s 3 of the Land Acquisition Ordinance under *gazette* notification dated 8 April 2010 and 15 April 2010. The second respondent and the applicant had on 15 November 2010 agreed that the compensation sum for the acquisition at RM9,990,000. Apart from the applicant's land, the second respondent had also acquired 68 other parcels of lands from owners in the area for the above stated public purpose. In view of the acquisition the applicant executed and gave the relevant memorandum of surrender to the second respondent in respect of the Telipok land on 16 November 2010. The applicant had also given up vacant possession of the Telipok land.

[3] Between the period from November 2010–May 2011, the respondents and Sedco which is the statutory body tasked to develop the Sepangar SME and Halal Hub came to the conclusion that the acquisition costs of the 69 parcels of land will far exceed the sum of RM360m which in effect rendered the development financially not feasible, as a result of which a decision *was made* to cancel the Halal Hub project. With the cancellation, the respondents also decided to revoke the acquisitions of the 69 parcels of land by way of notification of revocation of acquisition dated 15 August 2011 gazetted under *Gazette* Notification No 625 of 2011 published in the *gazette* on 18 August 2011 and 25 August 2011.

[4] What has given rise to this application is that the applicant does not wish to have the Telipok land back and demands that the respondents pay the agreed compensation of RM9,990,000.

ISSUE

[5] In my view, there is only one issue and that is:

Whether the notification of revocation of acquisition dated 15 August 2011 gazetted under *Gazette* Notification No 625 of 2011 published in the *gazette* on 18 August 2011 and 25 August 2011 is valid in law and if not, should the court exercise its discretion under this judicial review application and set aside the revocation?

THE APPLICANT'S CASE

[6] The contention of the applicant is straightforward and it is this. The compulsory acquisition of the Telipok Land had been completed by virtue of the operation of ss 3(1), (2), (3), 6 and 10 of the Land Acquisition Ordinance which read as follows:

Acquisition of land

3.

(1) If the Yang Di-Pertua Negri considers that any land should be acquired for a public purpose he may cause a declaration to that effect to be made in the manner provided by this section and the declaration shall be conclusive evidence that the land to which it relates is required for a public purpose.

(2) Every declaration shall be published in two ordinary issues of the Gazette and copies thereof …

(3) *Upon the second publication of the declaration in the Gazette as aforesaid the land and the buildings and erections thereon shall, without any conveyance, vest in the Government free from all encumbrances and shall be deemed to have been surrendered by the lawful owner thereof* and the Director of Lands and Surveys shall take or cause to be taken all such steps as are necessary by way of registering memoranda against the titles to the land affected or otherwise to give effect to such order and every person in possession of any title or copy of the title affected by this section shall produce such title or copy to the Director of Lands and Survey … for such purpose. (Emphasis added.)

Authorised officer to treat with landowner

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(1) As soon as any declaration has been published in accordance with the provisions of section 3, the authorised officer shall, without delay, enter into negotiations (or further negotiations) for the purchase of the land to which the declaration relates upon reasonable terms and conditions, and by voluntary agreement with the owner.

Abandonment of acquisition

(1) At any time before any land has been acquired compulsorily the Yang Negeri may, by notification published in the Gazette, declare that the intended acquisition of such land is abandoned.

[7] With the acquisition complete after the second publication of the *gazette*

on 15 April 2010, the Telipok land in law vested and now belongs to the first respondent. And since there is no express power vested in the first respondent after the completion of the compulsory acquisition to revoke the acquisition, learned counsel for the applicant contends that any revocation of the completed acquisition of Telipok Land is unknown in law and has no effect. I do not doubt the accuracy of that contention for the simple reason that any alienation of state land (which Telipok land is now is after the compulsory acquisition) can only be done through the procedure provided for in the Land Ordinance which in essence involves an application to the Director of Lands and Surveys Department and if approved, an issuance of a letter of offer by the Director containing the relevant conditions to and acceptance by the applicant. It is not disputed that the procedure had not been followed in this case as the applicant did and still does not want the Telipok land.

THE RESPONDENTS' CASE

[8] The learned state attorney general ('State AG') in his usual clarity concedes that there is no express provision in the state statutes conferring a right of revocation of a completed compulsory acquisition of Telipok Land. However he submits that the first respondent under extraordinary circumstances can in law revoke and withdraw the acquisition. The extraordinary circumstances according to the learned AG are these. The acquisition in this case was only completed on paper in that Sedco had never taken physical possession of the Telipok land and the other acquired lands. In another word, there has not been any change of any nature in the Telipok land; hence the applicant had suffered no prejudice, financially or otherwise as the respondents had agreed to compensate any out of pocket expense to the applicant resulting from the revocation. The applicant can now sell the Telipok land to any third party and will be able to recover the sum of RM9,990,000. On the other side of the coin, if the first respondent is compelled to proceed with the acquisition, the first respondent will have to pay hundreds of millions, stuck with the lands and a waste of public funds. It is also urged by the learned state AG that the court must weigh the prejudice to the first respondent and the applicant and in doing so there can be only one conclusion and that is public interest dictates that the first respondent should not be involved in an exercise of wastage of public funds. In view of this public interest, it is further submitted that the court, though faced with a situation where the revocation is done without any express provision in the statute book, still has the discretion under case law to refuse the plaintiff's application to set aside the revocation. The learned AG has cited five cases to support his submission but suffice for me to refer to two cases. In *Khoo Ah Imm @ Chang Bee Kiam & Ors v Datuk Bandar Kuala Lumpur & Anor* [1997] 2 MLJ 602; [1997] 3 CLJ 519, the Court of Appeal through Gopal Sri Ram JCA at p 608 (MLJ) p 525; (CLJ) held as follows:

Now, it is well settled that certiorari is one of those remedies in public law which cannot be claimed ex debito justitiae, but is a discretionary remedy. An applicant who makes out a case may yet be denied the remedy on a number of grounds, depending on the facts and circumstances of each case. For example, an applicant for certiorari who is able to establish that a wrong has been done to him in public law may be denied relief on the ground that the public interest outweighs his grievance. See *Smith and Others v Inner London Education Authority* [1978] 1 All ER 411. The factors when a court may take into account when denying relief are so numerous and so variable that it is unwise and impossible to list them out.

[9] In *Ngu Toh Tung & Ors v Superintendent of Lands & Survey, Kuching Division, Kuhing & Anor* [2006] 1 MLJ 142; [2006] 1 CLJ 30, Gopal Sri Ram JCA at pp 147–148 (MLJ); pp 38–39 (CLJ) has this to say:

The appellants are quite correct in their submission that the first respondent's award is contrary to s 60(1)(a) of the Code. But an infringement of the law per se is insufficient unless it visits or is likely to visit a substantial injustice upon the appellants. If it does not, then the court is entitled to refuse certiorari. And this brings into sharp focus on aspect of public law remedies that is often overlooked. No doubt, the public law remedy of certiorari appears in the vast majority of cases to have been granted as of right once an infringement of the law was demonstrated. So, one tends to assume that it is a remedy of right. But it is not. If you look carefully enough at those cases where the remedy was granted, you will find that they concerned applicants who has suffered or were likely to suffer a substantial injustice in consequence of a breach of law.

[10] Learned AG also relies on s 28(1) of the Interpretation and General Clauses Enactment 1963 to submit that the first respondent has an implicit power to revoke.

[11] Section 28(1) provides as follows:

Where any State law confers a power or imposes a duty, then, unless the intention appears, the power may be exercised, and the duty shall be performed, from time to time as occasion requires.

[12] The case of *William Lawrie v George Lees* (1881) 7 App Cas 19 was relied on as per Lord Penzance at p 29 in that case held as follows:

… the words 'from time to time' are words which are constantly introduced where it is intended to protect a person who is empowered to act from the risk of having completely discharged his duty when he has once acted, and therefore not being able to act again in the same direction. *The meaning of the words 'from time to time' is that after he has made one order he may* make afresh order to add something to it, or take something from it, or *reverse it altogether* … (Emphasis added.)

[13] In the words of the learned AG, the submission reads as follows:

> iv. the power to revoke or withdraw a compulsory acquisition is implicit in the power to issue the relevant notices in relation to compulsory acquisition. Put another way, if there was a discretionary power to issue notices in relation to compulsory acquisition, there must be an equal discretion to revoke or withdraw the compulsory acquisition;
>
> v. the other significant phrase in section 28(1) above is 'unless the contrary intention appears'. There is no prohibition to the State Government revoking or withdrawing the acquisition;

FINDINGS OF COURT

[14] From the outset, let me say that I agree with the learned AG that the remedy of certiorari is a discretionary one. As with any exercise of discretion, it must be exercised judicially and how it is exercised is dependent on the circumstances of each individual case. As postulated by Gopal Sri Ram JCA (as he then was) above, the poser which the court is required to determine is whether the applicant has suffer substantial injustice as a result of the excess exercise of power by the respondents.

[15] Learned counsel for the applicant however submits that the cases relied on by the respondents are not applicable on the ground that the first respondent's purported revocation of the acquisition is not known to law or in another word, the first respondent does not possess any power to revoke whether by statute or otherwise. What I think learned counsel for the applicant is saying is that the act of revocation of the first respondent is a nullity and as such the question of discretion does not arise at all. Though no authorities have been relied on by learned counsel, such authorities can be found in two judgments of Lord Denning in *DPP v Head* [1959] AC 83 and *R v Paddington Valuation Officer ex p Peachey Property Corporation Ltd* [1966] 1 QB 380.

[16] In *DPP v Head*, the House of Lords was concerned with the order of the Secretary of State made pursuant to Mental Deficiency Act 1913 in respect of a woman whom the respondent (Mr Head) was alleged to have carnal knowledge with and was charged under s 56(1)(a) of the Mental Deficiency Act 1913 which states as follows:

> Any person — (a) who unlawfully and carnally knows … any woman or girl under care or treatment in an institution or certified house or approved home, or whilst placed out on licence therefrom or under guardianship under this Act …shall be guilty of a misdemeanour …

[17] At the commencement of that trial, it was conceded by the prosecution

that the certificate issued by the secretary of State was defective as it was made without any evidence of the woman being a 'moral defective'. The trial court convicted Mr Head but on appeal to the Court of Criminal Appeal quashed the conviction. On appeal to the House of Lords, the decision of the Court of Criminal Appeal was upheld with Viscount Simonds dissenting. Lord Denning in his judgment approached the appeal in this manner and I quote:

> This contention seems to me to raise the whole question of void and voidable: for if the original order was void it would in law be a nullity. There would be no need for an order to quash it. It would be automatically null and void without much ado….But if the original order was only voidable, then it would not be automatically void. Something would have to be done to avoid it. There would have to be an application to the High Court for certiorari to quash it … And being only voidable, the court would have a discretion whether to quash it or not. It would do so if justice demands it, but not otherwise.

[18] Lord Denning in *R v Paddington Valuation Officer ex p Peachey Property Corporation Ltd* in dealing with the legality of a rating list prepared by the valuation officer also approached the issue in the same manner when he said as follows:

> It is necessary to distinguish between two kinds of invalidity. The one kind is where the invalidity is so grave that the list is a nullity altogether. In which case there is no need for an order to quash it. It is automatically null and void without more ado. The other kind is when the invalidity does not make the list void altogether, but only voidable. In that case it stands unless and until set aside.

[19] From the above, the following principles of law can be distilled:

(a) if the impugned act is a nullity or void, the court is not required to quash that act as it is a patently ineffective act;

(b) if the impugned act is a nullity or void, the question of the court's discretion does not arise for the simple reason that there is nothing to impugn; and

(c) if the impugned act is a voidable act, only then the court's discretion as to whether or not to quash is called upon.

[20] The distinction between void and voidable acts is now taken over by the principle of ultra vires. This is made clear by Lord Irvine LC in *Boddington v British Transport Police* [1999] 2 AC 143 at p 154 when he said:

> by extending the doctrine of ultra vires so as to embrace any error of law and render the decision a nullity, 'made obsolete the historic distinction between errors of law on the face of the record and other errors of law … Thus, today, the old distinction between void and voidable acts on which Lord Denning relied … no longer applies.

[21] Similarly, Lord Denning's view that void acts can be ignored 'without much ado' without the need to seek the court's help to quash void acts has not been accepted by the law Lords in England as well. This is understandable for the simple reason that until the court declares any act a nullity or void, there is no certainty that such act is indeed a nullity. To say that such act is 'automatically null and void without more ado' is an over simplification of the problem. The reality is that litigants do come to court to seek relief when faced with such void acts of public authorities.

[22] I will now deal the nature of the act of revocation by the second respondent. In the course of writing this judgment, I was brought to the notice of but not referred to by respective counsel the case of *Cekal Berjasa Sdn Bhd v Tenaga Nasional Sdn Bhd* [2002] 1 MLJU 626; [2002] 1 LNS 315 which is quite similar to the case at hand and in view of this similarity, it is appropriate that I deal with this case in some details. In that case, the facts as summarised by the learned judge are as follows:

> Within a narrow compass, the facts may be stated as follows. The defendant as a licensee under the Electricity Supply Act 1990 ('Act'), issued a notice under s 11(2) of the said Act to enter the land identified as Lot 3254, Mukim 13, Daerah Timur Laut, Pulau Pinang belonging to the plaintiff for the purpose of installing electricity transmission cable posts and other equipments. That notice was first served onto the previous owner of the said land by the name of Taman Terubong Sdn Bhd on 22 November 1995. The previous owner of the said land had objected to the notice as provided for under s 11(3) of the said Act. In the interim period, the plaintiff purchased the said land from Taman Terubong Sdn Bhd and the purchase was effected on 8 November 1996. After hearing the objections, the district land administrator not only approved the defendant's entry into the plaintiff's land for the specified purposes but it also directed the defendant to pay the compensation for such entry. In due course, the district land administrator assessed the compensation payable by the defendant to the plaintiff in the sum of RM1,016,453.43 and issued an order to that effect which was 31 March 1998 pursuant to s 16(1) of the said Act. Unfortunately, the defendant refused to pay the compensation to the plaintiff despite several demands advanced by the plaintiff. It is because of the defendant's refusal to pay the compensation that the plaintiff was forced to file the originating summons in encl (1). The defendant's refusal to pay the compensation amount was due to the fact that it had cancelled the project of installing the electricity transmission system on the plaintiff's land due to financial consideration. (last sentence added by me).

[23] It was contended by the plaintiff in that case (Cekal) that since the compensation had been assessed by the District Land Administrator, the defendant there (Tenaga) is obliged to pay the assessed amount of RM1,016,453.43. In another word, the Tenaga's intention to use Cekal's land for the purpose of installing electricity transmission is complete and Tenaga had no right to unilaterally revoke the award despite the fact that it did not

want to enter Cekal's land due to financial problems considering that there is no express provision in the Electricity Supply Act 1990 ('Act') to allow Tenaga there to revoke or withdraw their decision under s 11 of the aforesaid Act.

[24] Tenaga's contention was this. Section 11 of the Electricity Act which provides the mode of entering lands for the purpose of installing electricity transmission when construed in a purposive manner does not allow Cekal to force Tenaga to pay the assessed amount when Tenaga had decided not to proceed with its original intention to install an electricity transmission system.

[25] The learned judge dealt with the two and opposing contentions with his usual comprehensive manner by discussing various and numerous local and commonwealth cases on the subject of how courts should construe statues. His Lordship relies heavily on the judgment of *Lim Phin Khian v Kho Su Ming* [1996] 1 MLJ 1 and had quoted with approval the judgments of both Edgar Joseph Jr FJ and Gopal Sri Ram JCA (as he then was) which for completeness I should reproduce the same. Edgar Joseph Jr SCJ (as he then was) had this to say at p 16 of the report:

> In these circumstances, to uphold the preliminary objection would lead to a manifest injustice and would serve no purpose, so that, if at all possible, this court should be astute to avoid such a result unless, of course, this is what the Amending Act of 1995 plainly requires, in which case, the function of the court is to give effect to the will of Parliament as expressed in the law.
>
> It is not difficult to cite an anthology of cases for the proposition that where great inconvenience or injustice will follow as a result of requiring strict compliance with a statute, the courts will be disinclined to hold that the provision imposes an obligation even though it may be couched in mandatory terms. In *Simpson v AG* [1955] NZLR 271, for example, the provisions of the New Zealand Constitution pertaining to the dissolution of Parliament, which were couched in mandatory terms, were said not to have been complied with. This contention, if upheld would have nullified a large number of Acts of Parliament. The court held that notwithstanding the fact that the relevant provisions in the Constitution used the word 'shall', the provisions were directory only. In so holding, the court was swayed by the consideration that to hold that the provision was mandatory would have caused chaos and extraordinary inconvenience and would have served no useful purpose. *Clayton v Heffron* (1960) 105 CLR 214 is an Australian case which illustrates the same point.

[26] Gopal Sri Ram JCA in a separate judgment at p 26 of the report had this to say:

> In my judgment, the correct approach is to look at the substance and general purpose of the legislation in order to discover its objective aim or purpose. And when I do that, I am much moved to the conclusion that Parliament could not have intended those horrendous consequences of which I spoke a moment ago. To hold

otherwise would mean that Parliament went through the elaborate process of creating the Court of Appeal and endowing it with all the appellate powers and jurisdiction theretofore enjoyed by the Supreme Court, only to leave it bereft of any business. It would mean that Parliament was legislating in vain. With respect, I do not think that it is open for me to reach such a conclusion.

I may mention in passing, that in the course of considering the preliminary objection, I called for and read the explanatory statement to the Bill which was presented in Parliament, and which was passed as the Amending Act of 1994. In doing so, I proceeded by analogy, acting upon the landmark decision of this court in *Chor Phaik Har v Farlim Properties Sdn Bhd* [1994] 3 MLJ 345 at p 360, where a dynamic extension of the relevant interpretative principles was effected by the judgment of Edgar Joseph Jr FCJ. However, I have derived no real assistance from the explanatory statement to the Bill and its contents have in no way influenced my decision upon this matter.

[27] Gopal Sri Ram JCA further said at p 28 to p 29 of the report:

I have, as indicated earlier, relied upon an extraneous source and an internal aid to reach the conclusion I have expressed upon the effect of s 17. Lest it be thought that in doing so I have emblasoned a trail upon which all but angels in fear may tread, I hasten to add that I have relied upon sound and respectable authority to guide me through the course I have chartered for myself. Of these, I need only mention two; one for each approach. In resorting to the historical background to the section, I have been persuaded by what Lord Griffith said in *Pepper (Inspector of Taxes) v Hart* [1993] AC 593; [1993] 1 All ER 42; [1992] 3 WLR 1032, a case upon which much reliance was placed by my learned brother Edgar Joseph Jr FCJ in the *Farlim* case to which I referred earlier in this judgment. The passage in the speech of Lord Griffith appears in [1993] AC 593 at p 617; [1993] 1 All ER 42 at p 50; [1992] 3 WLR 1032 at p 1040, of the report and in it he says this:

> The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears on the background against which the legislation was enacted.' I must confess that I have done likewise when arriving at my decision upon the point taken in the present appeal. In respect of sidenotes, I would refer to what Upjohn LJ said in *Stephens v Cuckfield Rural District Council* [1960] 2 QB 373 at p 383:
>
> > While the marginal note to a section cannot control the language used in the section, it is at least permissible to approach a consideration of (the section's) general purpose and the mischief at which it is aimed with the note in mind.
> >
> > The approach that commended itself to Upjohn LJ on that occasion is the one that I have used in the fulfillment of my task in the present case.

[28] Relying on the principle of purposive construction, His Lordship came to the following construction of s 11 of the Electricity Act:

In short, the Federal Court in *Lim Phin Khian v Kho Su Ming* was prepared to adopt a purposive approach in interpreting the Courts of Judicature (Amendment) Act 1995 by looking at the historical background of the Amendment Act of 1995 and vigorously applied the case of *Pepper (Inspector of Taxes) v Hart* [1993] AC 593. In my judgment, this is the kind of approach that should be adopted in construing s 11 of the said Act which relates to the 'power to enter on land for purposes of construction' which is at best a mere procedural rigmarole which although may be mandatory is itself not a section which is mandatory in nature. This simply means that s 11 of the said Act will not and cannot come into play unless the defendant invokes that section in order to enter onto the land in question for the purposes of construction. Section 11(5) of the said Act, as reproduced earlier, states that, 'If no objection is lodged within the time limited for that purpose by subsection (4), the licensee may forthwith enter on the land and do all or any of the acts specified in the notice given under subsection (2),' and I need to highlight the following words:'… the licensee may forthwith enter on the land' which must be read with the marginal notes to s 11 of the said Act itself which reads 'Power to enter on land for purposes of construction' and when so read — which is a permissible exercise in aid of construction as alluded to by Gopal Sri Ram JCA in *Lim Phin Khian v Kho Su Ming*, then I can readily say that the said Act as a whole implies that s 11 thereof gives a discretion to the defendant whether to enter the plaintiff's land in question and, consequently, the defendant may decide to revoke or withdraw its intention should the defendant feels it proper to do so. Here, in the context of the present case, the defendant chose not to enter onto the plaintiff's land. 'Great inconvenience or injustice will follow as a result of requiring strict compliance' with s 11 of the said Act (borrowing the words of Edgar Joseph Jr FCJ in *Lim Phin Khian v Kho Su Ming*. I, for my part, would be unwilling to hold that s 11 of the said Act imposes an obligation onto the defendant to enter the plaintiff's land even though that section is couched in mandatory terms. The costs of proceeding with the project on the plaintiff's land is atrocious. It would create 'chaos and extraordinary inconvenience' not to mention expense if the defendant is required to enter the plaintiff's land and carry out the project. Here, in the context of the present case, the defendant chose not to carry on with the project on the plaintiff's land …

The sum total of it all is this. That the eventual result of the award by the district land administrator, if executed to the fore, would be contrary to justice and common sense because as explained by Muhammad Syafl'i bin Gampang in his affidavit in reply in encl 4 that the compensation to be paid is excessive when compared to the whole project. Furthermore, to force the defendant to proceed with the project would not only be financially burdensome on the defendant it would eventually affect the defendant's consumers as well. To pay the compensation in full even though the defendant has since abandoned the idea of proceeding with the construction of 275 kv electricity supply project via a rentice line from Kampong Binjai to Farlim Air Hitam, Daerah Timur Laut, Pulau Pinang would be, to say the least, repugnant to the intent of the said Act in general. It must be recalled that in *Lim Phin Khian v Kho Su Ming*, Edgar Joseph Jr FCJ said, inter alia, at p 16 of the report that 'where great inconvenience or injustice will follow as a result of requiring strict compliance with a statute, the courts will be disinclined to hold that the provision imposes an obligation even though it may be couched in mandatory terms'.

[29] It cannot be disputed that there is a great similarity between the case at hand and *Cekal Berjasa Sdn Bhd v Tenaga Nasional Sdn Bhd*. Like the Electricity Act, the Land Acquisition Ordinance, there is no express provision to allow cancellation of any intended acquisition of lands. Like Tenaga in *Cekal Berjasa Sdn Bhd v Tenaga Nasional Sdn Bhd*, the first respondent does not want to proceed with the acquisition of the land on the ground that the project of creating an Halal Hub at Sepangar is just not financially feasible in view of the compensation required to be paid to the owners of the acquired lands. It can also can be said that like *Cekal Berjasa Sdn Bhd v Tenaga Nasional Sdn Bhd*, if the respondents are required to pay the agreed compensation of RM9,990,000, it will serve no useful purpose and in fact would not achieve the very purpose of the acquisition, that is, the development of a Halal Hub. Furthermore I agree with the learned AG that the first respondent had not taken possession of the Telipok land and also that the acquisition exercise thus far is only in paper. I also agree that the applicant prima facie had not suffered any prejudice, financial or otherwise except for some out of pocket expenses and inconvenience which is not disputed by the respondents.

[30] Should I then apply the approach taken in *Cekal Berjasa Sdn Bhd v Tenaga Nasional Sdn Bhd* and dismiss the applicant's application?

[31] As a matter of public policy, I have no doubt that I should dismiss the applicant's application. In fact that is what the learned AG is asking me to do so on the ground that it would be a wastage of public funds to force the first respondent to pay the compensation. In short it is in the public good that the court pins on the revocation of the acquisition of the Telipok Land with a badge of legality so that the first respondent or the public will not be burdened with this financial liability.

[32] Whenever I am called upon to use public policy to reach a decision, I bear in my mind what Burrough J said in *Richardson v Mellish* (1824) 2 Bing 229 at p 252:

> (Public Policy) is a very unruly horse, and when once you get astride of it you never know where it will carry you.

[33] Parke B in *Egerton v Brownlow* [1843–60] All ER Rep 970; 4 HLCas 106 at p 123 had described public policy as this:

> Public policy is a vague and unsatisfactory term …; it is capable of being understood in different senses, it may, and does, in its ordinary sense, mean 'political expedience', or that which is best for the common good of the community; and in that sense there may be every variety of opinion, according to education, habits,

talents, and dispositions of such person, who is to decide, whether an act is against public policy or not. To allow this to be a ground of judicial decision, would lead to the greatest uncertainty and confusion.

[34] The approach of Ungoed-Thomas J in *Lawlor and others v Union of Post Office Workers* [1965] 1 All ER 353 at p 364 is also instructive. This is what he said:

> My duty here is, to the best of my ability, to administer justice according to law. I am not concerned with the political or economic consequences of doing so. To do that would be to dabble in politics, and that is not my function here. I am only concerned with matters of public policy so far as they are expressed in legal principles of general application.

[35] With those views foremost in my mind, I will now look at the relevant provisions of law and they are ss 3(1), (2), (3), 6 and 10 of the Land Acquisition Ordinance which have been set out earlier in my judgment. But for convenience, the provisions in substance provide that on the second publication of *gazette*, the Telipok land vests in the first respondent. The other statute which is of relevance is the Land Ordinance, in particular ss 9, 10 and 12 which read as follows:

> 9 Alienation of State land.
>
> (1) Subject to any general or special direction of the Cabinet the Director may alienate State land on such terms or in such manner as is authorised by this Ordinance and may also impose special conditions in respect thereof to be set out in the title.
>
> (2) In particular such conditions may specify the particular product or class of products which or which alone is to be cultivated, and may forbid the cultivation of any particular product or class of products.
>
> State land to whom alienable.
>
> 10 State land may be alienated only to —
>
> (a) an individual person or persons:
>
> Provided that in the case of a minor an adult person shall be added as guardian;
>
> (b) a company, body corporate or society registered or specifically exempted from registration under any written law:
>
> Provided that it is not prohibited by its constitution from holding land;
>
> (c) (Deleted);
>
> (d) any other person or body which may hereafter be empowered by the Minister by rule hereunder to hold land within Sabah.
>
> Applications for State land.

12 Applications for State land may be made to the Director, or to the Collector, and shall be substantially in the form of Schedule III.

[36] These provisions are clear and that is State land can only be alienated to any individual or corporate entity by applications by them to and to be approved by the Director of Lands and Surveys. There is no other provision in law for alienation of State land, be it by way of revocation of the compulsory acquisition or otherwise. There are two undisputed factors of utmost importance which I need to take into account in my deliberation and they are these. First the Telipok land in law is vested in the first respondent irrespective whether or not the first respondent had taken physical possession; hence the applicant has no legal or equitable right to deal with it. Second, there is no specific provision in the statute book allowing the second respondent to revoke the acquisition.

[37] Learned counsel for applicant had referred me to the India position which in my view bears some resemblance to the case at hand and is of some help. From my reading of the text book — *Law of Acquisition of Land in India* by RK Sarkar 1998 — there are specific provisions in their Land Acquisition Act 1894 for vesting of the acquired land and for withdrawal of the acquisition. Under India law, vesting in the government takes place after a bona fide award or a reference has been made by the collector and possession has taken place. As for withdrawal of the acquisition, the India Government is empowered to withdraw if they find that it does not need the acquired land anymore. In *Sham Lol (Dr) v Patiala and East Punjab States Union ADR* 1955 NUC 1873 (Pepsu), the issue mere was whether the government can withdraw when the acquired land has been vested in the government. Chopra J held that when once the land vests in the government, the government cannot divest itself of it by withdrawing from the acquisition which is already complete except for the payment of compensation. It can be seen from that case that even though there is a specific provision in law for withdrawal of the acquired land, such power of withdrawal cannot be exercised once the acquired land is vested in the government.

[38] Reverting back to case at hand and keeping the two important undisputed factors mentioned above foremost in my mind, it is my considered view that I cannot concede to what the respondents are asking the court to do and my reasons are as follows:

(a) I would be taking a leap into the realm of making law if I were to find that the second respondent has the implied power to revoke the acquisition. The courts cannot give that power when they themselves do not possess that right to give. At the risk of being accused of stating the obvious, the courts' role is a constitutional one and that is simply to interpret the law

as we find them. The only time which the courts are empowered to make law is in the realm of common law and rules of equity. It is not the duty of the courts to plug omissions left there by the Legislature. That duty lies and remains with the Legislature; A

(b) further to concede to the contention of the respondents would, with respect, be ignoring the basic principle of our Federal Constitution and that is the principle of 'separation of powers' where the power to legislate is with the Legislature, the power to enforce the legislation is with executive and finally the power to interpret the legislation and of ensuring compliance with the law lies with the courts. This basic principle of separation of power must never be trampled on; B C

(c) I would be ignoring ss 9, 10 and 12 of the Land Ordinance which provide the manner in which this State is allowed to alienate State land. Any other manner in which individual or corporate entity become registered owners of State lands would contravene the above law and ultra vires. In law I would be ignoring ss 9, 10 and 12 of the Land Ordinance which provide the manner in which this State is allowed to alienate State land. Any other manner in which individual or corporate entity become registered owners of State lands would contravene the above law and ultra vires. In law the present rightful owner of the Telipok Land is without doubt the first respondent by virtue of the operation of law. Neither this court nor anyone else can ignore this vesting of ownership; D E

(d) though on the face of it, the applicant may not have suffered any prejudice, it may and will suffer in the future in that he would and may have problem in selling or charging the Telipok land as any potential purchaser or financial institution respectively would need to ensure that the applicant is in fact the legal and beneficial owner of it. Can the applicant or for that matter anyone else give the potential purchaser or the financial institution the assurance that the applicant is the legal and beneficial owner when there is no dispute that he obtains the Telipok land back not in accordance to law? In my view, even a letter by the second respondent would not suffice as he cannot circumvent the law. As for the contention that the applicant could sell the Telipok Land to get the RM9,990,000 the same could be said for the first respondent who could easily tender the Telipok land to the public to recover the RM9,990,000; F G H

(e) I am fully aware of the view, which I whole heartedly agree, that courts must adopt a purposive approach in constructing legislation. There is merit in the contention that the purpose of the Land Acquisition Ordinance is a public interest driven legislation as the first respondent is entitled to acquire land compulsorily only for public purpose. Any purpose other public purpose would make any compulsory acquisition of I

land invalid and a nullity. Be that as it may, the court cannot ignore the law which in my view is clear and beyond any hint of uncertainty or ambiguity;

(f) in respect of s 28(1) of the Interpretation and General Clauses Enactment 1963, I agree with learned counsel for the applicant that Lord Penzance's interpretation of the phrase 'from time to time' has no application to the context of the legislations which I am asked to construe. Furthermore, there is no question of discretion to issue notices in relation to compulsory acquisition and I say that for the simple reason that the Land Acquisition Ordinance requires such notices be given in the form of two *gazette* publication and at the risk of repetition, the Telipok land vests in the first respondent on the second *gazette*. In short, the notice of revocation has no legal basis; hence the question of discretion does not arise. As for the use of the phrase 'unless the contrary intention appears' to submit that since there is no provision prohibiting the revocation power, I with respect find no merit to it as it ignores the effect of the vesting of ownership of the Telipok land to the first respondent on the second publication of the acquisition notice. As stated earlier, the vesting was by operation of law and I find no reason to ignore such clear wordings in a statute; and

(g) as there is no vesting provision in the Electricity Act as in the Land Acquisition Ordinance, I decline to follow the case *Cekal Berjasa Sdn Bhd v Tenaga Nasional Sdn Bhd*.

[39] As much as I sympathise with the predicament of the first respondent, the court's hands are tied. Their remedy with respect lies elsewhere.

ORDERS

[40] For reasons stated above, I declare and make the following orders:

(a) that the compulsory acquisition of the land held under Country Lease No 015045306 situated at Telipok in the District of Kota Kinabalu, Sabah under s 3 of the Land Acquisition Ordinance 1950 (Sabah Cap 69) gazetted under Gazette Notification No 283 of 2010 published in the *Gazette* on 8 April 2010 and repeated on 15 April 2010 was final and completed;

(b) that the purported revocation of the compulsory acquisition of the land held under Country Lease No 015045306 situate in Telipok in the District of Kota Kinabalu, Sabah gazetted under *Gazette* Notification No 283 of 2010 by notification of revocation of acquisition dated 15 August 2011 gazetted under Gazette Notification No 625 of 2011 published in the *Gazette* on 18 August 2011 and on 25 August 2011 and the decisions

relating thereto were made by the first respondent without jurisdiction and wrong in law and hence invalid, null and void and of no effect;

(c) that the notification of revocation of acquisition dated 15 August 2011 gazetted under *Gazette* Notification No 625 of 2011 published in the *Gazette* on 18 August 2011 and on 25 August 2011 is ultra vires, invalid, null and void and of no effect;

(d) the decision of the first respondent to revoke the compulsory acquisition of the eland held under Country Lease No 015045306 situate in Telipok in the District of Kota Kinabalu, Sabah gazetted under *Gazette* Notification No 283 of 2010 by notification of revocation of acquisition dated 15 August 2011 gazetted under *Gazette* Notification No 625 of 2011 published in the *Gazette* on 18 August 2011 and on 25 August 2011 is hereby quashed;

(e) the decision of the first respondent to revoke *Gazette* Notification No 283 of 2010 by notification of revocation of acquisition dated 15 August 2011 gazetted under *Gazette* Notification No 625 of 2011 published in the *Gazette* on 18 August 2011 and on 25 August 2011 is hereby quashed; and

(f) costs of this application in the sum of RM30,000 to be paid by the respondents to the applicant.

Application allowed with costs.

Reported by Ashok Kumar